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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/588,092

05/10/2007

Paul Oreste Gioia

60838.000610

4356

21967

7590

10/14/2010

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EXAMINER

SOROUGH, ALI

ART UNIT

PAPER NUMBER

1617

MAIL DATE

DELIVERY MODE

10/14/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	Application No. 10/588,092	Applicant(s) GIOIA, PAUL ORESTE	
	Examiner ALI SOROUGH	Art Unit 1616	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 13 September 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: _____.
- Claim(s) objected to: _____.
- Claim(s) rejected: 15, 18, 19 and 21-30.
- Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/A. S./
Examiner, Art Unit 1617

/KARLHEINZ R SKOWRONEK/
Primary Examiner, Art Unit 1631

Continuation of 11. does NOT place the application in condition for allowance because: Applicant argues that the amendment to incorporate the concentrations of the solvent and emulsifiers makes the claim commensurate in scope with the affidavit of unexpected results filed on 02/01/2010. Therefore, Applicant asserts that the results of unexpected data should be made sufficient to overcome the rejection of record. Applicant's argument has been fully considered but found not to be persuasive. Applicant has only shown unexpected results for a composition comprising 455.97g/L of active agent, 120 g/L of emulsifier, and 20 g/L of solvent. The claims are directed to a range of concentrations and therefore the comparison is not commensurate in scope with the claims. Furthermore, Applicant's results of unexpected data are not supported by Applicant's specification. Applicant's specification has no disclosure as to emulsion quality. Even assuming *arguendo* that this was the case, Applicant provides data that is a difference in degree, not a difference in kind. Applicant's data that the prior art formulation has degraded emulsion quality after 1 week at -5°C and that the instant formulation has good emulsion quality under the same conditions is a relative assessment and therefore not persuasive. The evidence relied upon should establish that differences in results are in fact unexpected and unobvious and of both statistical and practical importance. *ex parte* Gelles. It also Applicants burden to explain how the data in the affidavit is evidence of non-obviousness. *ex parte* Ishizaka. Applicant has not met either of these conditions.

Applicant argues that a *prima facie* case of obviousness has not been made for choosing DBE-IB out of a list of possible solvents taught by Hei et al. Applicant's argument has been fully considered but found not to be persuasive. The list of solvents taught by Hei et al. is a finite list and therefore one of ordinary skill in the art would recognize that all those solvents including DBE and DBE-IB are suitable alternative forms of solvents useful in emulsifiable concentrates. Further, one of ordinary skill would choose a solvent that would provide the best quality emulsion with regard to the active agent. Therefore, the rejections of record are maintained .